IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MFS, INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No. 08CV2508
THOMAS A. DILAZARO, Individually, et al.	:	
	:	
Defendants.		

JOINT PROPOSED JURY INSTRUCTIONS

Plaintiff, MFS, Inc., and Defendants, Thomas A. DiLazaro, Mark Wejkszner, Michael D. Bedrin, Sean L. Robbins, respectfully request that the Court give the following Instructions to the Jury in this case. Each Proposed Instruction that is jointly agreed to by the parties is designated as "Jointly Proposed." In each instance where an Instruction is not jointly agreed upon by the parties, the Instruction is designated as either "Plaintiff's Proposed Instruction" or "Defendants' Proposed Instruction." The parties reserve the right to amend or supplement these proposed jury instructions as this case progresses.

Respectfully submitted,

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JOINT PROPOSED JURY INSTRUCTIONS

TABLE OF CONTENTS

Corporate Parties.....1

Section 1983-Introductory Instruction.....2

Section 1983-Elements Of Claim.....3

Section 1983-Action Under Color Of State Law –
Action Under Color Of State Law Is Not In Dispute.....4

Section 1983-Deprivation Of A Federal Right.....5

First Amendment-Retaliation.....6

First Amendment-Retaliation-Adverse Action.....8

Section 1983-First Amendment Retaliation-
Protected Activity-Motivating Factor.....11

Defendants' Section 1983-First Amendment Retaliation-
Protected Activity-Motivating Factor.....12

Section 1983-Due Process Violations.....13

Fourteenth Amendment-Due Process Clause-
Recognized Property And Liberty Interests.....15

Fourteenth Amendment-Procedural Due Process.....16

Fourteenth Amendment-Procedural Due Process-Final Action.....19

Fourteenth Amendment-Substantive Due Process.....21

Fourteenth Amendment-Substantive Due Process-Elements.....23

Fourteenth Amendment-Equal Protection.....26

Fourteenth Amendment-Equal Protection-Class Of One.....27

Fourteenth Amendment-Equal Protection-
Class Of One-Similarly Situated.....28

Section 1983-Liability in Connection with the Actions of Another-
Failure to Intervene 30

Defendants' Section 1983-Compliance with NESHAP 32

Limitations-Continuing Violations Doctrine 33

Limitations-Use Of Prior Discrete Acts As Evidence Of Timely Claims 34

Limitations-Continuing Violation Of Civil Rights 35

Section 1983-Damages-Compensatory Damages 36

Section 1983-Damages-Punitive Damages 38

Indemnification of Compensatory Damages 41

Indemnification of Punitive Damages 42

Section 1983-Damages-Nominal Damages 43

Intentional Interference With Prospective Contractual
Relations Or Prospective Advantage-Elements 44

Defendants' Intentional Interference With Prospective Contractual
Relations Or Prospective Advantage-Motive 45

Intentional Interference With Prospective Contractual Relations Or
Prospective Advantage-Measure of Compensatory Damages 46

Intentional Interference With Prospective Contractual Relations Or
Prospective Advantage-Punitive Damages-Amount of Award 47

General Instructions For Use During Trial-Use Of Deposition 49

General Instructions For Use During Trial-Use Of Interrogatories 51

"Inferences" Defined 53

Impeachment-Inconsistent Statements Or Conduct-
Falsus In Uno Falsus In Omnibus 54

"Direct" And "Circumstantial" Evidence-Defined 55

General Instructions For Use During Trial-Charts And Summaries 56

Judicial Admissions 57

Questions Not Evidence......64

Court's Comments Not Evidence 65

Election of Foreperson – Interrogatories to the Jury 66

Communications Between Court and Jury During Jury's Deliberations......67

Credibility of Witnesses......68

Province of the Jury 69

JOINT PROPOSED JURY INSTRUCTION NO. 1

(Corporate Parties)

In this case, the Plaintiff, MFS, Inc., is a Pennsylvania corporation. The fact that one of the parties is a corporation does not mean it is entitled to any lesser consideration by you. All litigants are equal before the law, and corporations, big or small, are entitled to the same fair consideration as you would give any other individual party.[1]

Given ____________

Modified ____________

Refused ____________

[1] Adapted and modified from Volume 4 Modern Federal Jury Instructions – Civil § 72-1 (Matthew Bender).

JOINT PROPOSED JURY INSTRUCTION NO. 2

(Section 1983 – Introductory Instruction)

Some of Plaintiff MFS' causes of action in this case have been filed pursuant to a law known as Section 1983 which provides a remedy to persons, which includes corporations such as MFS in this case, who have been deprived of their federal constitutional rights under color of state law.[2] One of Plaintiff MFS' causes of action has been filed pursuant to Pennsylvania state law. I will now instruct you as to the law relating to all of MFS' causes of action in this case.

Given ____________

Modified ____________

Refused ____________

---

[2] Adapted and modified from Volume ◊ Modern Federal Jury Instructions – Civil (3d Circuit), § 4.1 (Matthew Bender).

JOINT PROPOSED JURY INSTRUCTION NO. 3

(Section 1983 – Elements of Claim)

For the claims filed pursuant to Section 1983, Plaintiff MFS must prove both of the following elements by a preponderance of the evidence:

First: The Defendants, or any one of the Defendants, acted under color of state law.

Second: While acting under color of state law, the Defendants, or any one of the Defendants, deprived MFS of a federal constitutional right.

I will now give you more details on action under color of state law, after which I will tell you the elements that MFS must prove to establish a violation for each of its federal constitutional claims.[3]

Given __________

Modified __________

Refused __________

[3] Adapted and modified from Volume ◊ Modern Federal Jury Instructions – Civil (3d Circuit), § 4.3 (Matthew Bender).

JOINT PROPOSED JURY INSTRUCTION NO. 4

(Section 1983 – Action Under Color Of State Law –
Action Under Color Of State Law Is Not In Dispute)

As I stated, the first element of claims filed pursuant to Section 1983 is that the Defendants acted under color of state law with respect to MFS' federal constitutional claims. I instruct you as a matter of law that each Defendant was acting under color of state law with respect to MFS' federal constitutional claims. In other words, this element of MFS' claim is not in dispute, and you must find that this element has been established for purposes of MFS' federal constitutional claims.[4]

Given __________

Modified __________

Refused __________

[4] Adapted and modified from Volume ◊ Modern Federal Jury Instructions – Civil, §§ 4.4 and 4.4.1 (Matthew Bender).

JOINT PROPOSED JURY INSTRUCTION NO. 5

(Section 1983 – Deprivation of a Federal Right)

I have already instructed you as a matter of law that the Defendants acted under color of state law with respect to MFS' federal constitutional claims.

The second element of claims filed pursuant to Section 1983 is that the Defendants, or any one of the Defendants, deprived MFS of a federal constitutional right.[5]

Given	__________
Modified	__________
Refused	__________

[5] Adapted and modified from Volume ◊ Modern Federal Jury Instructions – Civil (3d Circuit), § 4.5 (Matthew Bender).

JOINT PROPOSED JURY INSTRUCTION NO. 6

(First Amendment - Retaliation)

MFS has asserted a claim against each of the Defendants based on the First Amendment to the Constitution of the United States. The First Amendment protects the rights of a person, or a corporation such as MFS, to petition for a redress of its grievances with governmental officials, without having those governmental officials take any retaliatory action against the person exercising its First Amendment right to petition for redress of grievances. To establish a claim for retaliation under the First Amendment, a plaintiff must demonstrate each of the following three elements:

1. that the plaintiff engaged in a protected activity;
2. that the defendants responded with retaliation; and
3. that the protected activity caused the retaliation by the defendants.

In this case, I instruct you as a matter of law that MFS engaged in protected activity and, therefore, that MFS has satisfied the first of the three elements of this cause of action. The protected activities that MFS engaged in include but are not limited to the following: (i) the petitioning of the Secretary of the Pennsylvania Department of Environmental Protection; (ii) meeting with the Secretary of the Pennsylvania Department of Environmental Protection; (iii) petitioning other elected and government officials for redress of its grievances against the Defendants; (iv) appealing the Field Enforcement Order to the Pennsylvania Environmental Hearing Board.

You, the jury, must now decide if the other two elements of this cause of action have been shown by a preponderance of the evidence.[6]

Given ____________

Modified ____________

Refused ____________

[6] Adapted from Eichenlaub v. Township of Indiana, 385 F.3d 274 (3d Cir. 2004); Thomas v. Independence Township, 463 F.3d 285 (3d Cir. 2006); and Suppan v. DaDonna, 203 F.3d 228 (3d Cir. 2000).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 7

(First Amendment – Retaliation – Adverse Action)

In deciding whether MFS has satisfied the second element of its cause of action for retaliation under the First Amendment, you should consider whether MFS suffered any adverse action as a result of engaging in a protected activity. Any action can be an adverse action if it is intended to be punishment for exercising a First Amendment right. Thus, an adverse action can be trivial in scope or substantial in scope.

In this case, MFS claims that the adverse actions taken against it by the Defendants include: (i) declaring publicly and without legal justification that "MFS is definitely a nuisance" in response to inquiries about malodor; (ii) erroneously and publicly attributing concentrations of benzene, a commonly known carcinogen, to MFS; (iii) issuing erroneous, improper and/or illegal NOVs for alleged malodor to MFS; (iv) ignoring known sources of malodor and steering the public to direct complaints of malodor at MFS; (v) stonewalling the Title V permitting process by, inter alia, shifting the burden of proof for malodor offenses onto MFS; (vi) falsely representing material facts to the Secretary of PaDEP with regard to the Field Enforcement Order; (vii) using the Field Enforcement Order after it was withdrawn by PaDEP, as a basis for further adverse action against MFS in violation of applicable law; (viii) falsely representing to the Secretary of PaDEP that MFS "has a history of malodor problems" as if the malodor issue had been adjudicated and PaDEP met its burden of proof; (ix) falsely representing to the Secretary of PaDEP that EPA had denied MFS' request for both an alternative test limit and an alternative test method in connection with MACT; (x) falsely representing to the Secretary of PaDEP that there was an S02 problem at MFS; (xi) imposing two illegal, unreasonable, and/or arbitrary conditions during MFS' Title V permit renewal process; and (xii) using the Consent

Decree and alleged MACT compliance issue as a pretext to illegally impose a different standard on MFS relating to malodor than the applicable law provides.

You, the jury, must decide if MFS has suffered any adverse action, for exercising its First Amendment right to petition for a redress of its grievances against the Defendants, regardless of whether you think the adverse action suffered by MFS was trivial or substantial.[7]

Given ____________

Modified ____________

Refused ____________

[7] Adapted from Rutan v. Republican Party, 497 U.S. 62, 76 n.8, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); and Suppan v.DaDonna, 203 F.3d 228 (3d Cir. 2000).

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 7

Plaintiff contends the defendants retaliated against it by not renewing its Title V permit in a timely and acceptable manner because MFS had complained to governmental officials on how the defendants were treating it. It claims that it had a right to complain and that the defendants took adverse action against it because it complained. It claims a violation of its First Amendment right to petition the government.

Given ____________

Modified ____________

Refused ____________

JOINT PROPOSED JURY INSTRUCTION NO. 8

(Section 1983 – First Amendment Retaliation –
Protected Activity - Motivating Factor)

In showing that MFS' protected activity was a motivating factor for the Defendants' actions, MFS is not required to prove that its protected activity was the sole motivation or even the primary motivation for Defendants' decisions. MFS need only prove that its protected activity played a motivating part in Defendants' decision even though other factors may also have motivated Defendants. MFS could make this showing in a number of ways. The timing of events can be relevant, for example, if Defendants' action followed very shortly after Defendants became aware of a protected activity engaged in by MFS. However, a more extended passage of time between events does not rule out a finding by you that MFS' protected activity was a motivating factor in the decisions made by the Defendants. For instance, you may also consider any antagonism shown toward MFS by the Defendants or any change in demeanor toward MFS by the Defendants.[8]

Given ____________

Modified ____________

Refused ____________

[8] Adapted and modified from Volume ◊ Modern Federal Jury Instructions – Civil (3d Circuit), § 7.4 (Matthew Bender).

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 9

If the plaintiff establishes these elements of the claim, you may still find for the defendants on this claim, if the defendants prove the same adverse action would have taken place in the absence of the protected conduct. Baldassare v. New Jersey, 250 F.3d 188, 195 (3d Cir. 2001).

Given ____________

Modified ____________

Refused ____________

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 10

(Section 1983 – Due Process Violations)

In addition to its retaliation claim under the First Amendment that I just instructed you about, MFS has also asserted claims against each of the Defendants based on the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. MFS' Due Process claim against each of the Defendants is both a Procedural Due Process claim and a Substantive Due Process claim under the Fourteenth Amendment.

To state a claim under Section 1983 for violation of the Due Process Clause of the Fourteenth Amendment, whether it is a Procedural Due Process claim or a Substantive Due Process claim, a plaintiff must assert a recognized liberty or property interest under the Fourteenth Amendment and show, by a preponderance of the evidence, that it was intentionally or recklessly deprived of that interest, even if only temporarily, under color of state law.[9]

Given ____________

Modified ____________

Refused ____________

[9] Adapted and modified from "Section 1983 Federal Jury Practice and Instructions" Stephen Yagman, West Group 1988-§ 3-1.1.1.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 10

Plaintiff claims the defendants denied its property and liberty interests when the defendants did not renew the Title V permit in a timely and acceptable manner to MFS. It claims a violation of Fourteenth Amendment right to procedural due process.

Given ____________

Modified ____________

Refused ____________

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 11

(Fourteenth Amendment - Due Process Clause –
Recognized Property and Liberty Interests)

I instruct you as a matter of law that MFS has asserted recognized property and liberty interests in this case. The recognized property interests asserted by MFS in this case include MFS' property interests in the ownership of its Mineral Wool Plant and in its permit to operate its Mineral Wool Plant. The recognized liberty interests asserted by MFS in this case include MFS' liberty interests in pursuing an occupation and in using its property in pursuit of that occupation without undue and arbitrary governmental interference. The recognized liberty interests asserted by MFS in this case also includes MFS' liberty interest in its business reputation. Thus, I instruct you that the first element necessary for MFS to prevail on its claim for a violation of its due process rights has been established as a matter of law. You must now determine if MFS has shown by a preponderance of the evidence that it has been intentionally or recklessly deprived of one or more of its property or liberty interests, even if only temporarily, under color of state law.[10]

Given ____________

Modified ____________

Refused ____________

[10] Adapted from Paul v. Davis, 424 U.S. 693, 711-12, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Thomas v. Independence Township, 463 F.3d 285, 297 (3d Cir. 2006); Independent Enterprises, Inc. v. Pittsburgh Water & Sewer Authority, 103 F.3d 1165, 1179 n.12 (3d Cir. 1997); Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1259 (3d Cir. 1994); and Continental Coal, Inc. v. Cunningham, 511 F. Supp. 2d 1065, 1079 (D. Kan. 2007).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 12

(Fourteenth Amendment – Procedural Due Process)

A Procedural Due Process claim and a Substantive Due Process claim are separate and distinct claims, and you are instructed to consider each as separate claims.

The Procedural Due Process clause guarantees the right of a person, or a corporation such as MFS, to be heard at a meaningful time and in a meaningful manner. To determine if a plaintiff receives the Procedural Due Process that the Fourteenth Amendment guarantees, you may consider such factors as:

1. the private interest that will be affected by the actions being taken by the Defendants or any particular Defendant;

2. the risk that the plaintiff's Procedural Due Process rights will be violated by the actions being taken by the Defendants or any particular Defendant;

3. the probable value of any additional or substitute procedural safeguards; and

4. the fiscal or administrative burden, if any, that additional or substitute procedural safeguards would entail.

You, the jury, may use the factors that I listed to determine whether the plaintiff's Procedural Due Process rights guaranteed by the Fourteenth Amendment have been violated by not affording MFS the opportunity to be heard at a meaningful time and in a meaningful manner.[11]

Given ____________

Modified ____________

Refused ____________

[11] Adapted from City of Los Angeles v. David, 538 U.S. 715 (2003); Mathews v. Eldridge, 424 U.S. 319 (1976); and Eichelman v. Lancaster County, 510 F.Supp.2d 377, 388 (E.D. Pa. 2007).

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 12

The Fourteenth Amendment of the Constitution forbids a state from depriving persons of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. When a plaintiff sues under 42 U.S.C. § 1983 for a state actor's failure to provide procedural due process, a plaintiff must show (1) the asserted individual interests are encompassed within the fourteenth amendment's protection of 'life, liberty, or property; and (2) whether the procedures available provided the plaintiff with "due process of law. Robb v. City of Philadelphia, 733 F.2d 286, 292 (3d Cir. 1984).

In order for you to find for the plaintiff on the its procedural due process claim, plaintiff must prove that it had a property interest in receiving a "draft of the Title V permit" in a timely and acceptable manner, that it was denied the property interest and that it had taken advantage of the processes that are available to it receive the permit in a timely and acceptable manner or it must prove that processes were unavailable to receive the permit in a timely or acceptable manner or the process was patently inadequate. Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000). "[A] state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail itself of them." Dusanek v. Hannon, 677 F.2d 538, 543 (7th Cir. 1982); see also Bohn v. County of Dakota, 772 F.2d 1433, 1441 (8th Cir. 1985). A due process violation "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." Zinermon v. Burch, 494 U.S. 113, 126, (1990). If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants. See McDaniels v. Flick, 59 F.3d 446, 460 (3d Cir. 1995).

Given ____________

Modified ____________

Refused ____________

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 13

(Fourteenth Amendment –
Procedural Due Process – Final Action)

I instruct you as a matter of law that a plaintiff need not pursue a procedure that is blocked or a sham in order to prevail on a claim that its right to Procedural Due Process as guaranteed by the Fourteenth Amendment has been violated by a defendant. I instruct you as a matter of law that, prior to filing this lawsuit, MFS did not have a right to appeal the draft Title V Operating Permits issued to it that have been the subject of testimony in this case and that have been admitted into evidence in this case.[12]

Given ____________

Modified ____________

Refused ____________

[12] Adapted from Alvin v. Suzuki, 227 F.3d 107, 118 (3d Cir. 2000); and Opinion and Order, dated August 3, 2009, in MFS, Inc. v. DiLazaro, et al., Case No. 08CV2508, pending in the United States District Court for the Eastern District of Pennsylvania.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 13

I instruct you that pursuant to Pennsylvania law, MFS had a right to appeal the Department's failure to issue its Title V permit in a timely and acceptable manner any time after October 31, 2003. 35 P.S. § 4006.1(b)(3). 35 P.S. § 4010.2.

Given ____________

Modified ____________

Refused ____________

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 14

(Fourteenth Amendment – Substantive Due Process)

In this case, I remind you that MFS has asserted both a Procedural Due Process claim and a Substantive Due Process claim against each of the Defendants. As I instructed you previously, a Substantive Due Process claim is separate and distinct from a Procedural Due Process claim. The Substantive Due Process Clause of the Fourteenth Amendment protects a person, or a corporation such as MFS, from arbitrary or wrongful governmental action regardless of the fairness of the procedures used to implement them. The Substantive Due Process Clause is intended to prevent government officials from abusing their power or from using their power as a means to deprive a person, or a company such as MFS, of its federally protected constitutional rights. 13

Given ____________

Modified ____________

Refused ____________

[13] Adapted and modified from "Section [*5] 1983 Federal Jury Practice and Instructions" Stephen Yagman, West Group 1988-§ 3-1.1.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 14

MFS claims the defendants denied its property and liberty interests when the defendants did not renew the Title V permit. It claims a violation of its Fourteenth Amendment right to substantive due process.

Given ____________

Modified ____________

Refused ____________

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 15

(Fourteenth Amendment – Substantive Due Process - Elements)

To establish a claim for a violation of its Substantive Due Process rights under the Fourteenth Amendment, a plaintiff must satisfy two elements:

1. First, a plaintiff must show that it has a protected interest. I have already instructed you, as a matter of law, that MFS has established the requisite protected interest in this case.

2. Second, a plaintiff must show that the defendants acted with "deliberate indifference" towards the rights of the plaintiff.

Deliberate indifference is the standard of culpability to be applied to a Substantive Due Process claim under the Fourteenth Amendment when, as in this case, the Defendants had time to deliberate and think about their conduct before the Defendants engaged in that conduct. Deliberate indifference can be reflected by a conscious disregard for a risk. You, the jury, must decide if the Defendants, or any particular Defendant in this case, acted with "deliberate indifference" to the rights of MFS based on a preponderance of the evidence.[14]

Given ____________

Modified ____________

Refused ____________

[14] Adapted and modified from "Section 1983 Federal Jury Practice and Instructions" Stephen Yagman, West Group 1988-§§ 3-1.9 and 3-1.2.2; Phillips v. County of Allegheny, 515 F.3d 224 (3d Cir. 2008); Patrick v. Great Valley School District, 296 Fed. Appx. 258, 2008 WL 4516690 (3d Cir. 2008); and Sanford v. Stiles, 456 F.3d 298 (3d Cir. 2006).

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 15

The due process clause of the Fourteenth Amendment to the United States Constitution protects an individual against arbitrary action of government. County of Sacramento v. Lewis, 523 U.S. 833, 845. Allegations that government power has been arbitrarily and oppressively exercised implicate the substantive aspects of the due process clause. Id. at 846.

In order for you to find for the plaintiff on its claim that the defendants violated its substantive due process rights under the fourteenth Amendment, a plaintiff must prove the defendants' conduct deprived it of a protected interest involving an arbitrary abuse of official power which "shocks the conscience". United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 399 (3d Cir. 2003). For a property interest to be protected for purposes of substantive due process, it must be 'fundamental' under the United States Constitution." Hill v. Borough of Kutztown, 455 F.3d 225, 239 n. 12 (3d Cir. 2006). The shock the conscience standard only encompasses the most egregious conduct. Id. Allegations of mere negligence are insufficient to constitute a substantive due process violation. Lewis, 523 U.S. at 848-849. To "shock the conscience," the alleged misconduct must involve "more than just disagreement about conventional permitting provisions[15]" and rise to the level of self-dealing, an unconstitutional "taking," or interference with otherwise constitutionally protected activity on the property. Eichenlaub v. Township of Indiana, 385 F.3d 274, 285-86. (3d Cir. 2004); Dotzel v. Ashbridge, 306 Fed.Appx. 798, 800, 2009 WL 105746, 1 (3d. Cir 2009). The relevant level of arbitrariness required in order to find a substantive due process violation involves not merely action that is unreasonable, but, rather, something more egregious. Hunterson v. DiSabato, 308 F.3d 236, 247 (3d. Cir. 2002). For the purpose of due process, government conduct is arbitrary

[15] This language was modified to meet the facts of this case. Eichenlaub involved a zoning matter.

and irrational where it is not rationally related to a legitimate government purpose. Sameric Corporation of Delaware, Inc. v. City of Philadelphia, 142 F.3d 582, 595 (3d Cir. 1995).

Given ____________

Modified ____________

Refused ____________

JOINT PROPOSED JURY INSTRUCTION NO. 16

(Fourteenth Amendment – Equal Protection)

In addition to its claim for retaliation under the First Amendment and its claims for Procedural Due Process and Substantive Due Process under the Fourteenth Amendment, MFS has also asserted a claim against each of the Defendants based on the Equal Protection clause of the Fourteenth Amendment. MFS' Equal Protection claim under the Fourteenth Amendment is separate and distinct from MFS' Substantive and Procedural Due Process claims under the Fourteenth Amendment, and you are instructed to consider it as a separate claim. The Equal Protection clause of the Fourteenth Amendment protects a person, or a company such as MFS, against intentional and arbitrary discrimination in the enforcement of laws, whether occasioned by express terms of a statute or by its improper execution through government officials.[16]

Given ____________

Modified ____________

Refused ____________

[16] Adapted from Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); and Kaplan v. Chertoff, 481 F. Supp. 2d 370, 392 (E.D. Pa. 2007).

JOINT PROPOSED JURY INSTRUCTION NO. 17

(Fourteenth Amendment – Equal Protection – Class Of One)

In this case, the type of Equal Protection claim asserted by MFS is known as a "class of one" Equal Protection claim. To establish a claim for a violation of the Equal Protection clause of the Fourteenth Amendment on the basis of the "class of one" theory, a plaintiff must demonstrate each of the following three elements:

1. it was treated differently by the defendant than others similarly situated to the plaintiff;
2. the defendant did so intentionally; and
3. there was no rational basis for the difference in treatment.[17]

Given ____________

Modified ____________

Refused ____________

[17] Adapted from Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); and Hill v. Borough of Kutztown, 455 F.3d 225, 239 (3d Cir. 2006).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 18

(Fourteenth Amendment –
Equal Protection – Class of One – Similarly Situated)

"Similarly situated" does not mean "identical." Rather, similarly situated under the "class of one" theory of Equal Protection means that they are alike only in all relevant aspects. In this case, the relevant aspects to be considered by you, the jury, are whether there were sources in the vicinity of MFS' Mineral Wool Plant known to be emitting or capable of emitting the type of malodor that the Defendants attributed to MFS, and whether the manner in which the Defendants enforced the state's malodor laws against those other sources, as compared to the manner in which the Defendants enforced those same malodor laws against the Mineral Wool Plant, was different.[18]

Given ____________

Modified ____________

Refused ____________

[18] Adapted from Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992); Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008); and Opinion and Order, dated August 3, 2009, in MFS, Inc. v. DiLazaro, et al., Case No. 08CV2508, pending in the United States District Court for the Eastern District of Pennsylvania.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 18

Plaintiff bears a heavy burden of demonstrating that defendants had no rational justifications for any allegedly different treatment among similarly situated individuals. Eichenlaub v. Twp. of Indiana, 214 Fed. Appx. 218, 224 (3d Cir. 2007). The defendants' actions will be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis for their decision. F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313, 315 (1993). Plaintiff has the burden of negating every conceivable basis which might support the defendants' actions. Id. Under the rational basis standard, differential treatment does not violate the Equal Protection Clause if you should find that there is "a rational relationship between the treatment and a legitimate government interest." Heller v. Doe, 509 U.S. 312, 329 (1993).

Given ____________

Modified ____________

Refused ____________

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 19

(Section 1983 – Liability in Connection with the Actions of Another – Failure to Intervene)

MFS contends that one or more of the Defendants should be liable for failing to intervene to stop the violations of MFS' constitutional rights.

The Defendants are liable for that violation if MFS has proven all of the following four things by a preponderance of the evidence:

First: That one of the Defendants violated MFS' constitutional rights.

Second: That one or more of the Defendants had a duty to intervene to stop the violation of MFS' constitutional rights.

Third: That the Defendant or Defendants had a reasonable opportunity to intervene to stop the violation of MFS' constitutional rights..

Fourth: That the Defendant or Defendants failed to intervene to stop the violation of MFS' constitutional rights.[19]

Given __________

Modified __________

Refused __________

[19] Adapted from Volume ◊ Modern Federal Jury Instructions – Civil, § 4.6.2 (Matthew Bender).

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 19

In order for you to find for the plaintiff and against any of the defendants on plaintiff's constitutional claim, plaintiff must prove that the defendants had personal involvement in the violation of the plaintiff's constitutional rights. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). You cannot find the defendants liable because they are in supervisory positions. Id. You cannot find the defendants liable solely on the operation of respondeat superior. Id.

Given ____________

Modified ____________

Refused ____________

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 20

During the trial, you heard evidence that plaintiff was required to perform a test on its facility to demonstrate compliance with a federal law refer to as the Mineral Wool NESHAP. You also heard evidence that MFS has never performed such a test. I instruct you as a matter of law, because MFS had never demonstrated compliance with the Mineral Wool NESHAP, defendants were required to deny MFS Title V renewal application. Rochez Bros, Inc. Inc, v. Commonwealth of Pennsylvania, Department of Environmental Resources, 334 A.2d 790, 794 (Pa. Cmwlth. 1975)

Given ____________

Modified ____________

Refused ____________

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 21

(Limitations – Continuing Violations Doctrine)

In this case, the Defendants contend that MFS' claims relating to conduct prior to May 29, 2006 are barred by the statute of limitations. In other words, the Defendants contend that MFS can only pursue claims related to conduct that occurred on or after May 29, 2006. However, MFS has asserted that it is entitled to the benefit of equitable tolling of the two year statute of limitations under the continuing violations doctrine, a legal doctrine that extends the statute of limitations back to the date when the alleged wrongful conduct began.

In this case, MFS asserts that the wrongful conduct began in 2003, after MFS appealed the Field Enforcement Order and first began petitioning elected and government officials for a redress of its grievances, and continued in 2004 and 2005. MFS further asserts that the wrongful conduct that occurred in 2006 through 2008 is sufficiently connected and related to the wrongful conduct that occurred in 2003, 2004 and 2005.

You, the jury, must decide, based upon a preponderance of the evidence, if the wrongful conduct that occurred beginning in 2003 is sufficiently connected or related to the wrongful conduct that occurred after May 29, 2006.[20]

Given ____________

Modified ____________

Refused ____________

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[20] Adapted from Cowell v. Palmer Township, 263 F. 3d 286, 292 (3d Cir. 2001); Larsen v. State Employee's Retirement System, 553 F.Supp.2d 403 (M.D. Pa. 2008); and Nicolete v. Caruso, 315 F.Supp.2d 710 (W.D. Pa. 2003).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 22

(Limitations – Use of Prior Discrete Acts As Evidence of Timely Claims)

I instruct you as a matter of law that, even if you, the jury, determine that the conduct engaged in by the Defendants beginning in 2003 is not sufficiently connected or related to the conduct engaged in by the Defendants after May 29, 2006, you may still consider the conduct in earlier years as evidence in support of MFS' claims based upon the conduct engaged in by the Defendants after May 29, 2006.[21]

Given ____________

Modified ____________

Refused ____________

[21] Adapted from National R.R Passenger Corp. v. Morgan, 536 U.S. 101, 113, 122 S.Ct. 2061, 153 L.E.2d 106 (2002); and Miles v. Pennsylvania Department of Conservation and Natural Resources, 2009 WL 506371 (M.D. Pa. February 27, 2009).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 23

(Limitations – Continuing Violation of Civil Rights)

I also instruct you as a matter of law that where, as in this case, a continuing violation of civil rights is asserted, a violation occurs each day a wrongful policy is applied to, or a wrongful action is taken against, the plaintiff.[22]

Given ____________

Modified ____________

Refused ____________

[22] Adapted from Courtney v. LaSalle University, 124 F.3d 499, 505 (3d Cir. 1997); and Centifanti v. Nix, 865, F.2d 1422, 1433 (3d Cir. 1989).

JOINT PROPOSED JURY INSTRUCTION NO. 24

(Section 1983 – Damages – Compensatory Damages)

I am now going to instruct you on compensatory damages. Just because I am instructing you on how to award compensatory damages does not mean that I have any opinion on whether or not the Defendants, either collectively or individually, should be held liable.

If you find the Defendants, either collectively or individually, liable on any one or more of MFS' five causes of action, then you must consider the issue of compensatory damages. You must award MFS an amount that will fairly compensate it for any injury it actually sustained as a result of the Defendants' conduct.

MFS must show that the injury would not have occurred without the Defendants' act or omission. MFS must also show that the Defendants' act or omission played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of the Defendants' act or omission. There can be more than one cause of an injury. To find that the Defendants' act or omission caused MFS' injury, you need not find that the Defendants' act or omission was the nearest cause, either in time or space. However, if MFS' injury was caused by a later, independent event that intervened between the Defendants' act or omission and MFS' injury, the Defendants are not liable unless the injury was reasonably foreseeable by any of them.

Compensatory damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence. MFS has the burden of proving compensatory damages by a preponderance of the evidence. In this case, MFS claims the following items of compensatory damages:

(a) the loss value of the business in the amount of $7,698,000;

(b) professional and consulting fees in the amount of $159,840;

(c) post-closing costs in the amount of $831,827; and

(d) the loss of accrued interest in the amount of $757,916

(e) for a total compensatory damage claim of $9,447,583 less the value of the remaining machinery and equipment ($167,605) leaving a total of $9,279,978 claimed as compensatory damages.

In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any compensatory damages.[23]

Given __________

Modified __________

Refused __________

[23] Adapted and modified from Volume ◊ Modern Federal Jury Instructions – Civil (3d Circuit), § 4.8.1 (Matthew Bender).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 25

(Section 1983 – Damages – Punitive Damages)

In addition to compensatory damages, you may consider awarding MFS punitive damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future. The jury may award punitive damages even if you find the plaintiff suffered no actual injury.

You may only award punitive damages if you find that the Defendants or particular Defendants acted maliciously, wantonly or outrageously in violating MFS' federally protected rights. In this case there are multiple defendants. You must make a separate determination whether each defendant acted maliciously, wantonly or outrageously for purpose of deciding whether to assess punitive damages.

- A violation is malicious if it was prompted by ill will or spite towards MFS. A defendant is malicious when he consciously desires to violate federal rights of which he is aware, or when he consciously desires to injure the plaintiff in a manner he knows to be unlawful. A conscious desire to perform the physical acts that caused MFS' injury, or to fail to undertake certain acts, does not by itself establish that a defendant had a conscious desire to violate rights or injure MFS unlawfully.
- A violation is wanton if the Defendants or the particular Defendants committing the violation recklessly or callously disregarded MFS' rights.

If you find that it is more likely than not that the Defendants or particular Defendants acted maliciously or wantonly in violation of MFS' federal rights, then you may award punitive damages against the Defendants or any particular Defendants. However, an award of punitive damages is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied, then you may decide to award punitive damages, or you may decide not to award them. I will now discuss some considerations that should guide your exercise of this discretion. But remember that you cannot award punitive damages unless you have found that the Defendants or any particular Defendant in question acted maliciously or wantonly in violating MFS' federal rights.

If you have found that the Defendants or any particular Defendant acted maliciously or wantonly in violating MFS' federal rights, then you should consider the purposes of punitive damages. The purposes of punitive damages are to punish a defendant for a malicious or wanton violation of federal rights, or to deter the defendant and others like the defendant from doing similar things in the future, or both. Thus, you may consider whether to award punitive damages to punish the Defendants or any particular Defendant. You should also consider whether the compensatory damages you award standing alone are sufficient to deter or prevent the Defendants from again performing any wrongful acts he may have performed. Finally, you should consider whether an award of punitive damages in this case is likely to deter other persons from performing wrongful acts similar to those that the Defendants or any particular Defendants may have committed.

If you decide to award punitive damages, then you should also consider the purposes of punitive damages in deciding the amount of punitive damages to award. That is, in deciding the amount of punitive damages, you should consider the degree to which the Defendants or any particular Defendant should be punished for his wrongful conduct, and the degree to which an award of one sum or another will deter them or others from committing similar wrongful acts in the future.

In considering the purposes of punishment and deterrence, you should consider the nature of the Defendant's action. For example, you are entitled to consider whether the Defendants or any particular Defendant acted in a deliberately deceptive manner; and whether the Defendants or any particular Defendant engaged in repeated misconduct, or a single act. You should also consider the amount of harm actually caused by them [as well as the harm the defendant's act could have caused] and the harm that could result if such acts are not deterred in the future.[24]

Given __________

Modified __________

Refused __________

[24] Adapted and modified from Volume ◊ Modern Federal Jury Instructions – Civil (3d Circuit), § 4.8.3 (Matthew Bender).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 26

(Indemnification of Compensatory Damages)

The Commonwealth of Pennsylvania, through its self-insurance provisions, has indemnified the Defendants and will pay any compensatory damages that you award against any or all of them in this case.[25]

Given __________

Modified __________

Refused __________

[25] Adapted and modified from Section 1983 Litigation – Jury Instructions, Schwartz & Pratt (2d. Edition, Wolters Kluwer), Vol. 4 § 18.08.1.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 27

(Indemnification of Punitive Damages)

The Commonwealth of Pennsylvania, through its self-insurance provisions, has indemnified the Defendants and will pay for any punitive damages that you award against any or all of them in this case. If you decide to impose punitive damages against the Defendants, or any particular Defendants in this case, in fixing the amount of punitive damages, you may consider the fact that the State will indemnify the Defendants. Given the State's decision to indemnify the Defendants, you may consider the amount of punitive damages that may be necessary to stimulate actions by the State to punish and deter the Defendants, and other such state officials, from repeating the type of unconstitutional conduct at issue in this case.[26]

Given __________

Modified __________

Refused __________

[26] Adapted and modified from Section 1983 Litigation – Jury Instructions, Schwartz & Pratt (2d. Edition, Wolters Kluwer), Vol. 4 § 18.08.2.

JOINT PROPOSED JURY INSTRUCTION NO. 28

(Section 1983 – Damages – Nominal Damages)

An award of nominal damages may be appropriate when a violation of a plaintiff's constitutional rights has occurred, even if a plaintiff suffered no actual damages as a result of the violation of its constitutional rights.

A person whose federal rights were violated is entitled to a recognition of that violation, even if you find it suffered no actual damages. Nominal damages (of $1.00) are designed to acknowledge the deprivation of a federal right, even where no actual damages occurred.

In this case, MFS has asserted that it suffered actual damages in the amount of $9,279,978. If you find that MFS suffered actual damages, you must award compensatory damages (as I instructed you), rather than nominal damages.[27]

Given __________

Modified __________

Refused __________

[27] Adapted and modified from Volume ◊ Modern Federal Jury Instructions – Civil (3d Circuit), § 4.8.2 and Comment (Matthew Bender).

JOINT PROPOSED JURY INSTRUCTION NO. 29

(Intentional Interference with Prospective Contractual Relations Or Prospective Advantage - Elements)

In addition to its claims based on the First and Fourteenth Amendments to the Constitution of the United States, MFS has also asserted a claim against the Defendants based on state law. MFS' state law claim is a claim for Intentional Interference with Prospective Contractual Relations or Prospective Advantage. The elements of a claim for Intentional Interference with Prospective Contractual Relations or Prospective Advantage are:

1. The existence of a prospective contractual relation between the plaintiff and a third party;

2. Purposeful action on the part of the Defendants, or any particular Defendant, to induce or otherwise cause the third party not to enter into any contractual relationship;

3. The absence of privilege or justification on the part of the Defendant; and

4. The occasioning of actual legal damages as a result of the Defendants', or any particular Defendant's, conduct.[28]

Given ____________

Modified ____________

Refused ____________

[28] Adapted and modified from Pa. SSJI (CIV) 13.18; Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. 1997).

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 30

Factors you should consider in determining if the defendants' conduct intentionally interfered with a contract or a prospective contractual relation of the plaintiff are:

(a) the nature of the actor's conduct,

(b) the actor's motive,

(c) the interests of the other with which the actor's conduct interferes,

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

Ruffing v. 84 Lumber Co., 410 Pa.Super. 459, 467, 600 A.2d 545, 549 (Pa.Super. 1991).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 31

(Intentional Interference With Prospective Contractual Relations or Prospective Advantage – Measure of Compensatory Damages)

MFS is entitled to be fairly and adequately compensated for:

1. the monetary loss of the benefits of the prospective contractual relation or prospective advantage suffered by MFS;

2. all other monetary losses suffered by MFS as a result of the Defendants', or any particular Defendant's, acts;

3. the harm to MFS' business reputation as a result of the Defendants', or any particular Defendant's, act.[29]

Given ____________

Modified ____________

Refused ____________

[29] Adapted and modified from Pa. SSJI (CIV) 13:19; Klauder v. Cregar, 192 A. 667 (Pa. 1937); and Erdman v. Mitchell, 56 A. 327 (Pa. 1903).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 32

(Intentional Interference With Prospective Contractual Relations Or Prospective Advantage – Punitive Damages – Amount of Award)

In addition to compensatory damages, you may also award punitive damages against any or all of the Defendants on MFS' state law claim. If you decide that the plaintiff is entitled to an award of punitive damages, it is your job to fix the amount of such damages. In doing so, you may consider:

1. the character of each defendant's acts; and

2. the nature and extent of the harm to the plaintiff that the defendants caused or intended to cause.

It is not necessary that you award compensatory damages to the plaintiff in order to assess punitive damages against all or any of the defendants, as long as you find in favor of the plaintiff and against all or any of the defendants on the question of liability on at least one of MFS' various causes of action that I instructed you on previously.

[*Where there is more than one defendant:* You must determine whether punitive damages are to be assessed against each defendant by that defendant's conduct alone, and the amount of any punitive damages assessed must be measured by your consideration of the factors I have listed as they apply to each particular defendant. While you will return your award of compensatory damages, if any, in one lump sum amount as to all defendants, you must return a separate verdict as to punitive damages, if any, against each of the defendants.]

The amount of punitive damages awarded must not be the result of passion or prejudice against the defendant on the part of the jury. The sole purpose of punitive damages is to punish the defendant's outrageous conduct and to deter the defendant and others from similar acts.[30]

Given ____________

Modified ____________

Refused ____________

[30] Adapted from Pa. SSJI (CIV) § 14.02 (2005.

JOINT PROPOSED JURY INSTRUCTION NO. 33

(General Instructions For Use During Trial – Use of Deposition)

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers.

[The deposition of Defendant Sean Robbins, which was taken on March 24, 2009, is about to be presented to you by reading the transcript. Deposition testimony is entitled to the same consideration and is to be judged in the same way as if the witness had been present to testify.]

[The deposition of Defendant Thomas DiLazaro, which was taken on March 30, 2009, is about to be presented to you by reading the transcript. Deposition testimony is entitled to the same consideration and is to be judged in the same way as if the witness had been present to testify.]

[The deposition of Defendant Mark Wejkszner, which was taken on March 31, 2009, is about to be presented to you by reading the transcript. Deposition testimony is entitled to the same consideration and is to be judged in the same way as if the witness had been present to testify.]

[The deposition of Defendant Michael Bedrin, which was taken on April 14, 2009, is about to be presented to you by reading the transcript. Deposition testimony is entitled to the same consideration and is to be judged in the same way as if the witness had been present to testify.]

[The deposition of Ronald Mordosky, which was taken on April 22, 2009, is about to be presented to you by reading the transcript. Deposition testimony is entitled to the same consideration and is to be judged in the same way as if the witness had been present to testify.]

[The deposition of Becky Easley, which was taken on April 22, 2009, is about to be presented to you by reading the transcript. Deposition testimony is entitled to the same consideration and is to be judged in the same way as if the witness had been present to testify.]

[The deposition of Kathleen McGinty, which was taken on March 24, 2009, is about to be presented to you by reading the transcript. Deposition testimony is entitled to the same consideration and is to be judged in the same way as if the witness had been present to testify.]

Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.[31]

Given ___________

Modified ___________

Refused ___________

[31] Adapted and modified from Volume ◊ Modern Federal Jury Instructions – Civil (3d Circuit), § 2.5 (Matthew Bender).

JOINT PROPOSED JURY INSTRUCTION NO. 34

(General Instructions For Use During Trial – Use of Interrogatories)

[You will now hear [have heard] answers that Defendant Thomas DiLazaro gave in response to written questions submitted by the Plaintiff, MFS, Inc. The written questions are called "interrogatories." The written answers were given in writing and under oath, before the trial. You must consider Defendant Thomas DiLazaro's answers to interrogatories in the same manner as if the answers were made from the witness stand.]

[You will now hear [have heard] answers that Defendant Sean Robbins gave in response to written questions submitted by the Plaintiff, MFS, Inc. The written questions are called "interrogatories." The written answers were given in writing and under oath, before the trial. You must consider Defendant Sean Robbins' answers to interrogatories in the same manner as if the answers were made from the witness stand.]

[You will now hear [have heard] answers that Defendant Mark Wejkszner gave in response to written questions submitted by the Plaintiff, MFS, Inc. The written questions are called "interrogatories." The written answers were given in writing and under oath, before the trial. You must consider Defendant Mark Wejkszner's answers to interrogatories in the same manner as if the answers were made from the witness stand.]

[You will now hear [have heard] answers that Defendant Michael Bedrin gave in response to written questions submitted by the Plaintiff, MFS, Inc. The written questions are called "interrogatories." The written answers were given in writing and under oath, before the trial. You must consider Defendant Michael Bedrin's answers to interrogatories in the same manner as if the answers were made from the witness stand.][32]

Given ___________

Modified ___________

Refused ___________

[32] Adapted and modified from Volume ◊ Modern Federal Jury Instructions – Civil (3d Circuit), § 2.6 (Matthew Bender).

JOINT PROPOSED JURY INSTRUCTION NO. 35

("Inferences" Defined)

"Inferences" are deductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in the case. You may draw from the facts that you find such reasonable inferences as seem justified in light of your experience. However, you are to consider only the evidence in the case and the reasonable inferences that you draw therefrom.[33]

Given ____________

Modified ____________

Refused ____________

[33] Adapted from 3 Federal Jury Practice and Instructions, § 104.20 (2000, 5th ed.).

JOINT PROPOSED JURY INSTRUCTION NO. 36

(Impeachment-Inconsistent Statements Or
Conduct-Falsus In Uno Falsus In Omnibus)

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something, inconsistent what you heard the witness say under oath during trial.

If you believe any witness has been impeached and therefore discredited, you should give the testimony of that witness such credibility, if any, as it deserves.

If by impeachment or by comparison with other evidence, you find that any witness has testified falsely as to any fact, the law permits you to disregard completely the entire testimony of that witness. This is based upon the principle that someone who testifies falsely about one material fact may testify falsely about everything. You may accept as much or as little of her or his testimony as you consider and disregard what you feel is false, or you may disregard the entire testimony.[34]

Given ___________

Modified ___________

Refused ___________

[34] Adapted from 3 Federal Jury Practice and Instructions, § 105.04 (2000, 5th ed.).

JOINT PROPOSED JURY INSTRUCTION NO. 37

("Direct" And "Circumstantial" Evidence—Defined)

There are two types of evidence generally presented during a trial--direct evidence and circumstantial evidence. "Direct evidence" is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. "Indirect or circumstantial" evidence is proof of a chain of facts and circumstances indicating the existence or nonexistence of a fact.

The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.[35]

Given ____________

Modified ____________

Refused ____________

[35] Adapted from 3 Federal Jury Practice and Instructions, § 104.05 (2000, 5th ed.).

JOINT PROPOSED JURY INSTRUCTION NO. 38

(General Instructions For Use During Trial – Charts and Summaries)

MFS has presented exhibits in the form of charts and summaries. I decided to admit these charts and summaries in place of the underlying documents that they represent in order to save time and avoid unnecessary inconvenience. You should consider these charts and summaries as you would any other evidence.[36]

Given ____________

Modified ____________

Refused ____________

[36] Adapted and modified from Volume ◊ Modern Federal Jury Instructions – Civil (3d Circuit), § 2.7 (Matthew Bender).

PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 39

(Judicial Admissions)

A judicial admission is a formal concession made in court or prior to trial by a party or its attorney, conceding for purpose of trial, the truth of the admitted fact. In other words, you must accept a judicial admission as true and as having been established in this case. In this case, I instruct you as a matter of law that the following judicial admissions have been made:

1. At all times relevant, the Plaintiff, MFS, Inc. ("MFS"), owned the Mineral Wool Plant, which employed approximately 60 people. (Complaint at ¶ 11; Amended Answer at ¶ 11).

2. The Mineral Wool Plant remained in continuous operation from 1970 until February 2006, when MFS temporarily ceased manufacturing. (Complaint at ¶ 14; Amended Answer at ¶ 14).

3. The applicable law in Pennsylvania places on PaDEP [the Pennsylvania Department of Environmental Protection] the burden of proving that an odor rises to the level of a malodor and, in turn, that the malodor rises to the level of a public nuisance. PaDEP has never met that burden with respect to the Mineral Wool Plant. (Complaint at ¶ 30(A); Amended Answer at ¶ 30(A)).

4. There has never been a finding by either the Pennsylvania Environmental Hearing Board or any court that MFS has ever been in violation of Pennsylvania's malodor laws. (Complaint at ¶ 30(B); Amended Answer at ¶ 30(B)).

5. The NOVs [Notices of Violation] issued to MFS, moreover, were legally defective in certain respects, including: (iii) Some of the NOVs were contradicted by PaDEP's own complaint logs, which PaDEP eventually provided to MFS after numerous requests by MFS that PaDEP do so. (Complaint at ¶ 30(D)(iii); Amended Answer at ¶ 30(D)(iii).

6. The NOVs [Notices of Violation] issued to MFS for alleged malodor were not final actions of PaDEP and were not appealable by MFS. Moreover, none of the NOVs issued to MFS for alleged malodor ever resulted in a fine against MFS, nor was a fine ever attempted to be imposed against MFS by PaDEP for alleged malodor. (Complaint at ¶ 30(E); Amended Answer at ¶ 30(E)).

7. On or about November 8, 2001, DiLazaro caused an NOV [Notice of Violation] for alleged malodor to be issued to MFS. This was the first NOV for alleged malodor ever issued to and/or served on MFS since it took over operation of the Mineral Wool Plant in 1988. MFS had asked for details about the complaint giving rise to the issuance of the NOV so that it could look further into the matter, but PaDEP refused to provide any additional information to MFS. (Complaint at ¶ 56(B); Amended Answer at ¶ 56(B)).

8. On or about Friday, January 24, 2003, at approximately 5:10 p.m., DiLazaro instructed that a Field Enforcement Order be served on MFS based solely on the single NOV for alleged malodor that had been issued to MFS over one year earlier in November 2001. The Field Enforcement Order also had as an attachment a Request for Determination of Requirement for Plan Approval/Operating Permit ("RFD") form that MFS was directed to complete and submit by 5:00 p.m., on Monday, January 27, 2003, one business day later. (Complaint at ¶ 56(C); Amended Answer at ¶ 56(C)).

9. On or about February 12, 2003, DiLazaro caused a third NOV for alleged malodor to be issued to MFS. (Complaint at ¶ 56(J); Amended Answer at ¶ 56(J)).

10. On or about February 13, 2003, DiLazaro caused a fourth NOV for alleged malodor to be issued to MFS. (Complaint at ¶ 56(K); Amended Answer at ¶ 56(K)).

11. On or about February 25, 2003, on the last day possible for filing an appeal of the Field Enforcement Order referenced in subparagraph (F) above, MFS filed an appeal with the Pennsylvania Environmental Hearing Board because of the way it was continuing to be treated by DiLazaro and his staff. Robbins, who is believed by this time to have been working closely with DiLazaro on matters regarding MFS and the Mineral Wool Plant, handled the appeal for PaDEP. (Complaint at ¶ 56(M); Amended Answer at ¶ 56(M)).

12. On or about March 4, 2003, DiLazaro caused a fifth NOV for alleged malodor to be issued to MFS. (Complaint at ¶ 56(N); Amended Answer at ¶ 56(N)).

13. On or about April 23, 2003, during a conference call hearing on MFS' appeal of the Field Enforcement Order to the Environmental Hearing Board, the Administrative Judge questioned Robbins about issuing the Field Enforcement Order at 5:10 p.m. on a Friday and requiring compliance by the close of business on the following Monday. The Judge

stated that such actions evidence PaDEP's hostility and that such actions look bad to judges. The Judge told Robbins that PaDEP should not take similar actions in the future and that, of all the issues in this case, the timing of the Field Enforcement Order is the most salient thing, that this is not a positive thing for PaDEP, and that it appears to the judges on the Environmental Hearing Board that DiLazaro and his staff are acting like "little children." (Complaint at ¶ 56(O); Amended Answer at ¶ 56(O)).

14. On or about May 14, 2003, DiLazaro caused a sixth NOV for alleged malodor to be issued to MFS. (Complaint at ¶ 56(P); Amended Answer at ¶ 56(P)).

15. In early 2004, PaDEP rescinded the Field Enforcement Order, and, on February 12, 2004, MFS' appeal of that Field Enforcement Order was dismissed as moot. MFS had no right to appeal the various other NOVs which had been issued for alleged malodor, since they did not constitute final actions of PaDEP and since PaDEP took no further actions to enforce them against MFS at the times in question. (Complaint at ¶ 56(S); Amended Answer at ¶ 56(S)).

16. On August 10, 2006, MFS wrote to DiLazaro to advise that MFS had reached an agreement in principle with EPA [the U.S. Environmental Protection Agency] to resolve the MACT compliance test issue. MFS further advised DiLazaro that the agreement in principle contemplated that, due to MFS' unique configuration, MFS would be allowed to implement an agreed upon alternative test method to demonstrate compliance with MACT within six months of re-starting operations at the Mineral Wool Plant. Thus, EPA's Regional Office finally acknowledged that MFS was, in fact, configured differently than the other mineral wool manufacturing facilities in the United States and that an alternative test method was therefore warranted as MFS had been requesting all along. The agreement in principle between EPA and MFS had to be reduced to writing in the form of a consent decree and approved by the District Court in the EPA Litigation. On or about March 9, 2007, a proposed consent decree between MFS and EPA, reflecting the agreement in principle referred to in paragraph 24 above, was filed with the District Court (the "Consent Decree"). (Complaint at ¶¶ 24 and 25; Amended Answer at ¶¶ 24 and 25).

17. On or about March 23, 2007, the Consent Decree between MFS and EPA was published in the Federal Register at Volume 72, Number 56. The notice in the Federal Register advised that EPA would receive comments on the Consent Decree for a period of thirty (30) days. DiLazaro and Robbins were aware of the publication of the Consent Decree and of the thirty (30) day comment period. DiLazaro and Robbins were also aware

from communications with MFS that MFS intended to resume operations at the Mineral Wool Plant upon approval of the Consent Decree by the District Court. (Complaint at ¶ 26; Amended Answer at ¶ 26).

18. In a letter dated on or about July 25, 2007, EPA wrote to Robbins to advise that EPA would provide the documentation that it receives from MFS pursuant to the terms of the Consent Decree. In the same letter, EPA also confirmed its understanding that PaDEP was no longer objecting to the entry of the Consent Decree in the EPA Litigation. Neither Robbins, DiLazaro nor anyone else at PaDEP advised EPA that its understanding, as expressed in its letter of July 25, 2007, was incorrect in any way. (Complaint at ¶ 35; Amended Answer at ¶ 35).

19. On August 13, 2007, the Consent Decree between EPA and MFS was signed and entered by the District Court in the EPA Litigation. PaDEP filed no objection in the District Court to the entry of the Consent Decree, which was substantially in the form published in the Federal Register and which did not contain any of the revisions demanded by Robbins and DiLazaro. The Consent Decree allows MFS to conduct an alternative test to demonstrate compliance with MACT, due to the unique configuration of the Mineral Wool Plant, within six months of resuming operations at the Mineral Wool Plant. Such an alternative test method is what MFS had been requesting since the promulgation of the MACT. (Complaint at ¶ 36; Amended Answer at ¶ 36).

20. On or about January 30, 2008, MFS' representatives wrote to Robbins and, with respect to the alleged malodor issue, stated as follows:

> "Condition No. 028 on page 22 of the Proposed Permit, by way of example, strips MFS of all of its due process rights with respect to the issue of alleged malodor. Rather than follow the applicable law and procedure of the Commonwealth of Pennsylvania relating to alleged malodor, PaDEP has conditioned the Proposed Permit on PaDEP having the absolute right to immediately and indefinitely shut down MFS upon the mere issuance by PaDEP of a notice of violation ("NOV") for an alleged malodor. As you know, however, an NOV is not generally viewed as a final action by PaDEP and, accordingly, it is not typically enforceable in and of itself by PaDEP nor appealable by the recipient. It is not surprising, therefore, that the legal authority cited by PaDEP in Condition No. 028 does not support or authorize such a shut down.

Moreover, in the over 30-year history of the continuous operation of this facility, only approximately eight NOVs for alleged malodor have ever been issued. More importantly, none of these NOVs has ever been proven to be factually correct, nor has any liability by MFS ever been imposed, in accordance with applicable law and enforcement proceedings. In addition, at the time of the issuance of those NOVs, there were other known and/or admitted sources of such malodor in close proximity to MFS.

Notwithstanding the above facts, PaDEP apparently is expecting MFS (or any prospective purchaser of the facility) to make the substantial economic investment and long-term commitments necessary to re-start operations while waiving its due process rights as they relate to this issue of alleged malodor – an issue which the courts have recognized is highly subjective in nature. MFS simply cannot agree to such a condition.

Not only is Condition 028 an example of the unreasonableness of the Proposed Permit, it also appears to be an example of PaDEP's over-reaching. Clearly, PaDEP has a right to administer the laws and regulations of the Commonwealth of Pennsylvania as they relate to malodor, but its manner of doing so must be lawful, constitutional and within its grant of authority. We are aware of no authority that would allow PaDEP to permissibly engraft a state malodor regulation, let alone a truncated version of a regulation, onto a Federal Title V Operating Permit in the manner attempted here by PaDEP. The legal authority cited by PaDEP in Condition No. 028 does not authorize it. If you have any such authority, we request that it be identified and/or provided to us for our immediate review and consideration."

With respect to the Consent Decree entered by the District Court in the EPA Litigation, MFS' representatives wrote as follows:

"Equally troublesome is Condition No. 027 which begins on page 20 of the Proposed Permit. Condition No. 027 is an attempt by PaDEP to re-write the Consent Decree that was negotiated and agreed to by the Environmental Protection Agency ("EPA") and MFS in a case that arose from PaDEP's relinquishment of authority back to EPA.

> As you know, that Consent Decree was published in draft form for public comment, approved in final form by the U.S. District Court, and subsequently implemented by the parties. PaDEP's attempt to now re-write provisions of this Consent Decree is neither appropriate nor reasonable under these circumstances, and MFS cannot agree to this Condition."

MFS' representatives concluded the letter by stating:

> "The unreasonable, if not impermissible, positions taken by PaDEP in the Proposed Permit, as discussed above, are disappointing, to say the least. PaDEP's regional office's prior, inappropriate conduct as it related to MFS is well documented, and PaDEP's continued actions have prevented MFS from resuming its operations and/or from being acquired by another company."

(Complaint at ¶ 46; Amended Answer at ¶ 46).

21. On or about March 10, 2008, MFS' representatives again wrote to Robbins and stated, in pertinent part, as follows:

> "MFS thinks it is important to remind you, briefly, of the history whereby local officials of PaDEP previously made false and inflammatory public statements about MFS. Those erroneous comments directly caused public complaints about MFS and, although the local PaDEP officials were required to retract those comments months after they were made, the damage to MFS was done. You are now compounding that damage by continuing to treat MFS as a proven violator (which it is not) and by ignoring the fact that there were other admitted and/or possible sources of such malodor operating adjacent to or near MFS at the time in question.
>
> Your position on the above issues is simply unfair and unreasonable, and you have severely, if not irreparably, damaged MFS. In light of your apparent unwillingness to change your position, MFS has little choice now except to attempt to mitigate its damages by dismantling the plant and selling whatever machinery, equipment and parts that it can. It is regrettable that you have placed MFS in this position and, inter alia, prevented MFS from resuming operations, prevented the sale of the facility to a third party,

> and prevented the return of approximately 60 good paying jobs to the area."
>
> Secretary McGinty was copied on this letter.

(Complaint at ¶ 48; Amended Answer at ¶ 48).

Each of the factual statements that I just read have been conceded in this case by the Defendants. As such, they are judicial admissions that must be accepted by you as true, along with the other evidence, for the purpose of deciding this case.[37]

Given ____________

Modified ____________

Refused ____________

---

[37] See, e.g., Parilla v. IAP Worldwide Serv., VI, Inc., 368 F.3d 269, 275 (3d Cir. 2004) (judicial admissions are concessions in pleadings or briefs that bind the party who make them); and Glick v. White Motor Co., 458 F.2d 1287, 1291 (3d Cir. 1972) ("judicial admissions are binding for the purpose of the case in which the admissions are made").

JOINT PROPOSED JURY INSTRUCTION NO. 40

Questions Not Evidence

A lawyer's questions, even when they contained a statement of fact are not evidence. Only if the assertion was supported by evidence in the case may you consider it true.[38]

Given ____________

Modified ____________

Refused ____________

[38] Adapted from Federal Jury Practice and Instructions, § 71.12.

JOINT PROPOSED JURY INSTRUCTION NO. 41

Court's Comments Not Evidence

As a judge, I am permitted to comment to you on the evidence in the case. My comments are only my opinion as to the facts and you may disregard them entirely, because you, as jurors, are the sole judges of the facts in this case.

If my questions, rulings, statements or actions during this trial had a tendency, in your minds, to indicate any inclination for or against Plaintiff or the Defendant, you must disregard such questions, rulings, statements and actions, and you must reach a decision in the case only from the evidence presented in accordance with my instruction to you on the governing law.[39]

Given ____________

Modified ____________

Refused ____________

[39] Adapted from Federal Jury Practice and Instructions, § 71.11.

JOINT PROPOSED JURY INSTRUCTION NO. 42

Election of Foreperson -- Interrogatories to the Jury

Upon retiring to the jury room, you will select one person to act as your foreperson. The foreperson will preside over your deliberations and will speak on your behalf here in Court. A form containing questions to the Jury has been prepared for your convenience. You will take this form to the jury room.

The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question.

When you are done, the foreperson will date and sign the Jury Verdict Form, and you will then return with it to the courtroom.

Given ____________

Modified ____________

Refused ____________

JOINT PROPOSED JURY INSTRUCTION NO. 43

Communications Between Court and Jury During Jury's Deliberations

If, during your deliberations, it becomes necessary to communicate with me, send me a note by the deputy clerk, signed by your foreperson, or by one or more members of the jury. No juror should ever attempt to communicate with me by any means other than a signed writing, and I will never communicate with any juror other than in writing, or orally here in open Court.

The deputy clerk, as well as all other persons, are forbidden to communicate in any way or manner with any juror on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person -- not even to me -- how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.[40]

Given ____________

Modified ____________

Refused ____________

[40] Adapted from Federal Jury Practice and Instructions, Vol. 3 § 74.08.

JOINT PROPOSED JURY INSTRUCTION NO. 44

Credibility of Witnesses

As jurors, you are the sole judges of the credibility of the witnesses and the weight that their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence which contradicts the testimony given.

Carefully consider all of the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive, state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters covered by his or his testimony, and whether he or she impresses you as having an accurate recollection of these matters. As to each witness, consider whether and to what extent the witness has something to gain or lose by his or her testimony, and the extent to which, if at all, the testimony of each witness is either supported or contradicted by other evidence in the case.

After making your own judgment, give the testimony of each witness such weight, if any, as you think it deserves. Put simply, you may accept or reject the testimony of any witness in whole or in part.[41]

Given ____________

Modified ____________

Refused ____________

[41] Adapted from Federal Jury Practice and Instructions, § 73.04.

JOINT PROPOSED JURY INSTRUCTION NO. 45

Province of the Jury

Now you have heard the instructions of the Court on the law that you must apply to this case.

As jurors, it is your duty to follow the law as I state it to you, and to apply that law to the facts as you find them from the evidence in the case. Do not single out one instruction alone as stating the law, but consider my instructions as a whole. Also, do not be concerned with whether you agree or disagree with the law as I state it.

Nothing in these instructions is an indication that I have any opinion about the facts of the case, or what that opinion is. It is your job, not my job, to determine the facts.

You must perform your duties as jurors without bias or prejudice as to either party. The law does not permit sympathy, prejudice or public opinion to affect your decisions. The law requires, and both parties expect, that you will carefully and impartially consider all of the evidence, follow the law as I explain it to you, and reach a just verdict, regardless of the consequences.

CERTIFICATE OF SERVICE

I, Wayne C. Stansfield, Esquire, hereby certify that on this 20th day of November 2009, a true and correct copy of the parties' Joint Proposed Jury Instructions has been filed electronically and is available for viewing and downloading from the Federal Court's Electronic Case Files. A copy of the foregoing has been served today upon the following counsel in the manner indicated below:

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"s"/ Wayne C. Stansfield
Wayne C. Stansfield